

Having a Rational Nature as the Basis for Being a Subject of Rights

*Patrick Lee**

ABSTRACT: What is the basis for full moral worth or being a subject of rights? Are all human beings, or only just some, subjects of basic rights? This paper argues that the basis for being a subject of rights is a substantial nature – as opposed to an accidental attribute or set of accidental attributes, and, specifically, a rational nature, that is, a nature oriented to conceptual thought and deliberate choice. It also answers the objection that some beings are human beings and yet lack a rational nature, such as brain-dead bodies and radically cognitively impaired human beings.

WHAT IS THE BASIS for full moral worth or for being a subject of rights? What property or nature must an entity possess in order to be a subject of rights? There is a distinction between those things that it is permissible to use as mere means, on the one hand, and on the other, those beings we have a duty to respect, and even to treat as we would have them treat us. The question is this: By what criterion do we draw the line between those two sorts of beings? What is the basis in reality for drawing the line between subjects of basic rights and beings that are not subjects of rights?

I will argue here for the following criterion for being a subject of basic rights: having a rational nature. Expressed in another way: being a substance

* *Patrick Lee* is the John N. and Jamie D. McAleer Professor of Bioethics and the Director of the Center for Bioethics at Franciscan University of Steubenville. He is known nationally as a speaker and author on contemporary ethics, especially on marriage and the value of human life. Lee received his B.A. in philosophy at the University of Dallas, an M.A. in philosophy from Niagara University, and a Ph.D. from Marquette University. In 2006 he received the Cardinal Wright Award for excellence in the integration of faith and reason from the Fellowship of Catholic Scholars. In addition to numerous journal articles, his publications include *Abortion and Unborn Human Life*, *Body-Self-Dualism in Contemporary Ethics and Politics* (with Robert P. George), and *Conjugal Union: What Marriage Is and Why It Matters*.

with a rational nature.¹

To defend this criterion I will first contrast it with another view, what is often called the interest view, the position that the basis for being a subject of rights is having conscious interests, a position that is often specified by saying that to be a subject of rights one must have an immediately exercisable capacity or a disposition for self-conscious desires. I will indicate several difficulties against that position. Then I will provide evidence for the superiority of the substance-with-a-rational-nature position in relation to alternatives, and, finally, consider an important objection.

One position on basic rights is that what grounds rights is having interests. On this view a being can have interests only if it has desires – or has had desires – that could be frustrated. Thus it might also be called the desire account of basic rights. To support this position it is often pointed out that things like newspapers (the physical objects) and bicycles have no interests whereas developed human beings do. The relevant difference between them seems to be that the “harm” that one does to a newspaper cannot matter to the newspaper: such “harm” does not thwart (is not contrary to) the interests of the newspaper. That is because the newspaper does not have any interests. Nothing is of interest to the newspaper. And the reason why, it is argued, is that newspapers have no desires to be frustrated, whereas developed humans do.²

So, in order to have a right to something, one must have the capacity to have an interest in it, and to have an interest in something one must have a capacity to have a desire for it. Of course, in a broad sense of the term “desire” unconscious beings can be said to “desire” certain things, that is, they unconsciously tend toward certain types of actions and reactions.³ But on the

¹ Previous attempts of mine to clarify this issue include: “The Pro-Life Argument from Substantial Identity: A Defense,” *Bioethics* 18 (2004): 249-63; and with Robert P. George, *Body-Self Dualism in Contemporary Ethics and Politics* (New York NY: Cambridge Univ. Press, 2008), Ch. 4.

² Judith Thomson, “Abortion,” *Boston Review* (1995) at: bostonreview.mit.edu/BR20.3/thomson.html; Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York NY: Knopf, 1993); see also Bonnie Steinbock, *Life before Birth* (New York NY: Oxford Univ. Press, 1992).

³ Peter Singer holds that an individual must have a desire for continued life conceived of as a subject of experiences in order to be someone with full moral worth. Peter Singer, *Practical Ethics*, 3rd edition (New York NY: Cambridge Univ. Press, 2011), Chs. 4-6.

interest and desire account of basic rights, unconscious tendencies do not ground interests or rights. One has an interest in *X* only if one has a self-conscious desire for it. In order to possess rights one must either now have – or have had in the past – capacities for self-conscious desires.

According to this view, then, not all human beings have basic rights. Human embryos and fetuses do not yet have the capacity for their continued life as subjects of experience, and severely cognitively disabled human beings (such as some elderly patients with advanced Alzheimer's disease) also lack a self-conscious desire for continued existence as subjects of experience. On this account, then, at least some abortions and some instances of euthanasia do not deprive persons of basic rights.

One difficulty for this view is that – as Don Marquis, for example, has argued – it seems that an individual can be harmed before he or she is conscious, and not just in the sense that something can happen to an individual now that will later harm her.⁴ If you and I are human beings, and human beings are physical organisms, then you and I were alive as embryos and fetuses. Now, someone is harmed not only when something happens to her that makes her worse off (by some standard or other) but also if one is impeded from attaining what is good for oneself, that is, when one is deprived of a valuable future that one otherwise would have had. Thus, it seems that you and I could at some time prior to our being conscious (and prior to having an immediately exercisable capacity for self-conscious desires) have been harmed, and so it seems that in some sense we had interests before we were conscious.

A second difficulty with the desire view of what grounds basic rights is as follows. On this account the value of a future state of an individual derives from that individual's desire or positive attitude toward that future state. Smith's being alive at a future time is valuable and to be respected (promoted, protected, etc.) on the grounds that Smith now desires, cares about, takes an interest in (or has desired, cared about, taken an interest in) that future. But on this view people who are impeded from having desires for what would actually constitute their flourishing, their genuine fulfillment – for example, a person who is depressed or is brainwashed so as not to desire her future life – would

⁴ Don Marquis, "Why Abortion Is Seriously Wrong: Two Views" in *Bioethics with Liberty and Justice, Themes in the Work of Joseph Boyle*, ed. Christopher Tollefsen (New York NY: Springer, 2011), pp. 3-22.

not have a right to life or perhaps any other basic rights.

Moreover, the desire account of basic rights seems to put the cart before the horse. Conditions are not worthwhile because they are desired. Rather, they are desirable because they are worthwhile, because they have whatever it takes to make something worth being desired. Clearly, some of our desires are bad and some are merely whimsical or irrational. Since worthless objects as well as genuinely bad objects are sometimes desired, it follows that being desired cannot be what makes an object worthwhile.

Thus, prior to being desired, the object of desire must have something in it that makes it fitting or suitable to being desired. What makes a thing good cannot consist in its being the satisfaction of desires or preferences. Rather, desires and preferences are rational only if they are in line with what is genuinely good. So, a state of affairs should be desired or cared for if it is inherently valuable. A condition's being valuable makes desires reasonable for it, not vice versa. But the contrary idea – that the ground for rights (the ground for what ought to be accorded to a being) resides in that person's desires – is essential to the desire account of basic rights.

To show that these difficulties cannot be overcome would require considering several objections and various attempts to amend the desire account. These difficulties at least suggest that a different account is worth considering. In addition, there seems to be a further difficulty for the desire account that at the same time provides positive support for a central part of the position that I want to defend.

The basis for having fundamental rights must be either (a) the fundamental kind of thing or substance that an individual is or (b) an accidental attribute (or attributes). But the position that the basis for having fundamental rights is an accidental attribute inevitably involves arbitrary line-drawing.

To distinguish the beings that have basic rights from those that do not, one will have to point in some way to a mental function. The mental functions most often proposed have been self-consciousness or self-conscious desires. Also, any relevant attribute will have to be a capacity or a potentiality of some sort. For there does not seem to be any morally significant action that is at all times being performed by all of those who are obviously rights-bearers. Otherwise, even those who are asleep, for example, would not qualify as having rights.⁵

⁵ In *A Defense of Abortion* (New York NY: Cambridge Univ. Press, 2002) David

But human embryos and fetuses, for example, do have, in some sense, the same basic capacities for mental functions as other humans. Although they cannot now perform such functions, they are actively developing themselves to the stage at which they will do so. They have a structure or nature such that, provided the right environment, nutrition, and absence of violence, they will develop to the stage where they will perform such actions – something not true, for example, of an unborn dog or cat.

If I asked Jane, for example – an eighteen year-old student – whether she can run a marathon, she might truthfully say that she can if she trains for eight or ten weeks. In some cases one does have a capacity to do X, but before doing so one must first perform other actions, say, Y and Z. In that case, one can do X, but not immediately; one has a radical capacity to do X. Or one has a nature that enables and orients one to do X at some future stage.

Similarly, one might have the radical capacity to do X but be impeded from doing so now by an injury or disease from which one may or could recover. Thus, one may have a capacity to do something that requires time or healing in order to be actualized – a capacity that one has in virtue of one's nature, in virtue of the kind of being that one is. Let us call such a capacity a radical capacity. One can have a radical capacity to do many things that one cannot do right now, or do right away. But in such a case one has a structure that confers the capacity to do this sort of thing at some point or in certain circumstances, in virtue of one's nature.

Now, the accidental attribute account of basic rights excludes certain groups of human beings from having basic rights only if it specifies that the capacity needed to have basic rights is an immediately exercisable one, or exercisable in response to a stimulus, rather than a radical, natural capacity. And only then is it truly an accidental attribute account of basic rights, rather than one basing rights on a substantial nature. The radical capacity is either identical to the nature or a necessary consequent of it. For example, if the position is to lead to allowing for abortion or for some cases of euthanasia, then it must hold that having a radical, natural capacity for self-conscious desires or rationality is not sufficient for having basic rights. But why require

Boonin proposes to base the right to life on actual desires in the sense of dispositional desires, that is, dispositions to have desires. This does not contradict the point in the text since a disposition is a certain type or modification of a capacity.

an immediately exercisable capacity rather than only a radical capacity? It seems that this selection is, at best, arbitrary.

Moreover, there are strong reasons against such a requirement. What is referred to as an “immediately exercisable capacity” possessed by a human being is actually only a degree of actualization or development of a radical capacity that a human being possesses in virtue of the kind of being it is, the kind of living being that he or she is. A capacity such as that for self-consciousness, for example, is a power to perform a specific type of action. But it is grounded in some way in the constitution of the organism. With maturation the organism gradually develops its basic, radical capacities and arrives at the point where it performs the relevant action in the appropriate circumstances or environment.

The transition from having only the radical capacity for performing an action to the proximate or immediately exercisable capacity for that action is just the development of the same basic power that the organism possessed from its beginning.

But a mere quantitative difference (having more or less of the same feature, such as the development of a basic radical capacity) cannot by itself be a justificatory basis for treating different individuals of the same kind in radically different ways. Between the ovum and the approaching thousands of sperm, on the one hand, and the embryonic human being, on the other hand, there is a clear difference in kind. Between a human being suffering from advanced Alzheimer’s disease and a corpse, there is a clear difference in kind. But between the embryonic human being and that same human being at any later stage of its maturation, there is only a difference in degree. Between a relatively healthy elderly human being and a human being suffering from advanced dementia, there is only a difference in degree.

So, those who propose an accidental characteristic as qualifying an entity as a subject of basic rights are ignoring a radical difference among groups of beings and fastening onto a mere quantitative difference as the basis for treating different individuals of the same kind in radically different ways. In other words, there is a fundamental difference between two types of beings (A and B), but within the beings of type B there are mere differences of degree. Proponents of the position that having basic rights is grounded in an accidental characteristic, however, ignore that fundamental difference between A and B. Instead, they pick out a mere difference in degree between beings within that

second type (type B) and make that the basis for radically different kinds of treatment.

To do so violates the most basic canons of justice. To ground fundamental rights such as the right to life on an immediately exercisable capacity – as opposed to the living being’s nature, which at the same time involves all of its basic natural (radical) capacities – is in fact the deliberate selection of a certain degree of development of a given capacity. And it seems that such a selection is arbitrary.

Moreover, we might compare the act of killing something that has an immediately exercisable capacity for the attainment of a significant good with killing something that has only a radical capacity for the attainment of that good. In both cases one is depriving a living being – a living being that persists as a self-identical being throughout the time that he or she gradually moves closer and closer to attaining that good – of that significant good. But that deprivation or the prevention of that subject from attaining that significant good seems just as morally relevant – and perhaps more centrally so – for our deliberations than whether a self-conscious desire has been thwarted or not.

Thus, it is more reasonable to base the right to life on the substantial nature of the being – the fundamental kind of being that one is – rather than on developed, immediately exercisable capacities such as for self-consciousness or self-conscious desires. And so human beings possess basic rights in virtue of what they are (i.e., the kind of being that they are). Hence, all human beings – no matter what the stage of their development – possess basic rights, including a basic right to life.

A second argument in support of the position that the basis of rights is having a rational nature is that it provides a better account for commonly accepted moral convictions than its alternatives. If the alternative were true – that is, if one had to have an immediately exercisable capacity for higher mental functions in order to be a subject of basic rights – then it is hard to see why it would be wrong to kill a human being who is in a coma. A human being may be in a coma for several weeks, and during that time she is in certain respects like an embryo or fetus.⁶

⁶ On this point also see Francis Beckwith, *Defending Life, A Moral and Legal Case against Abortion Choice* (New York NY: Cambridge Univ. Press, 2007) and Russell DiSilvestro, *Human Capacities and Moral Capacities* (New York NY:

She lacks the immediately exercisable capacity for self-conscious acts or any type of higher mental acts. But she is a human being. Now the clearest reason why it is wrong to kill a human being in a coma is that she is the same kind of being as you and me. She is an individual possessing a nature that orients her to having self-consciousness and shaping her life by deliberate choices. But this same point is true of the unborn human being and is true of all human beings.

Someone might object that the individual who is in a coma is different from an unborn human being. The individual in a coma did have consciousness and self-conscious desires in her life in the past. And this being is a person and thus a bearer of rights because of that past self-consciousness and desires – that is why killing her is wrong.

But suppose that I were in a coma as a result, say, of a new type of brain disease that affected only a certain portion of the cerebral cortex and that we knew with certainty that, although I would regain consciousness in the future, I would not regain any of the same consciousness, any of the same memories or mental skills that I had in the past. Suppose that I would only gradually regain full consciousness and that I would have to learn everything again, including how to walk, how to talk, and so on. Would it be permissible to kill me then?

Of course not. But the reason would not be because of my past consciousness or self-awareness, since all of that consciousness, all of those memories, and mental skills, and so forth, are gone forever. The clearest explanation of why it would be wrong to kill me is that by killing me one would be depriving me of my whole future as a rational being, a being that, although not now conscious or self-aware, has a nature orienting him toward the stage where he will perform all of those distinctive human actions.

What makes it wrong to kill me in such a situation is not that one would be killing something that is presently conscious or even presently able to be conscious. It is enough that I am identical to the thing that eventually will have rational consciousness in order to have a right to life.

So, to be a subject of rights, it is enough if a being is constituted in such a way that she has an active disposition to develop herself toward acquiring rational consciousness. But the hypothetical scenario to which I have just

referred is in relevant respects similar to the position of human embryos and fetuses and, by parallel, to all human beings. All of these beings are of the same fundamental kind as you and me.

Thus, just as it would be wrong to kill me if I were in a coma while I was still unconscious but slowly developing to the point where I would be conscious, so it is wrong to kill human embryos or fetuses because they are human beings – individuals actively developing themselves to the stage where they will shape their own lives by rationality and deliberate choice. What makes an individual a subject of rights is the fundamental kind that he or she is. You and I and all human beings possess that fundamental nature and are of the same fundamental kind, at every stage of our lives.

A third argument in favor of the substantial, rational nature position comes from an analysis of how in our everyday lives we come to understand our basic responsibility to promote and protect the well-being of others, and not just our own well-being.

When we deliberate about what to do, we begin by apprehending that some objects or activities are worthwhile pursuing for their own sake and not merely as means toward other conditions. We apprehend, for example, that life and health, knowledge, aesthetic experience, harmony with other people, and other conditions are worth pursuing. Each of us recognizes that the conditions or activities that are genuinely fulfilling of oneself and of others like oneself are worthwhile in themselves.

At the same time I apprehend that I have a responsibility specified by these goods as opportunities – a responsibility, basically, to do something with my life, something worthwhile, responsive somehow to opportunities such as these.⁷ For I apprehend these goods not just as things that I would like to do but as conditions that are worthwhile. Further, in understanding that there are goods worth pursuing when I deliberate about what to do, I apprehend that I

⁷ Speaking of such goods, Joseph Boyle says the following: “The options supported by judgments of value make a kind of demand on the acting person, not necessarily the unconditional obligation of morality, but surely something more than the urgency of desire.” Joseph Boyle, “Reasons for Action: Evaluative Cognitions that Underlie Motivations,” *American Journal of Jurisprudence* 46 (2001): 177-97 at p. 195. The demand to which he refers there is what I am calling a responsibility that is not yet necessarily moral.

myself am an agent and I am someone whose being and fulfillment are worthwhile.

Now, I also apprehend that the persons next to me – for example, the persons sitting with me at the dinner table, or the kids playing games with me outdoors – are similarly situated toward these same basic human goods. I understand that the possibilities that I view are also possibilities that these other persons view, and I understand that the basic responsibility that I apprehend they also apprehend. And so I understand that the goods worthy of pursuit include not just those that fulfill my own self but also include at least the possible fulfillments of those who are presented (or can be presented) with the same type of view, and who see (or can see) the same type of responsibility. And as I apprehend that I am a person persisting through time and am worthwhile, I see that in just the same way the human beings next to me are also persons persisting through time and are worthwhile. As my life, health, knowledge and so on matter and are worth pursuing, in the same way the life, health, truth and so on of others who are similarly related to such goods are worth pursuing, and the persons themselves are worthwhile.

Thus, the responsibility specified by goods understood as worth pursuing and to-be-pursued extends to the goods – that is, the being and fulfillment – of all those who either do or can (now or in the future) understand these goods as worth pursuing. Thus, while animal urges or sheer desires do not ground or justify the choice-worthiness of their objects, being a fulfillment that one's practical reason can apprehend as a good worth pursuing does. It grounds and enables one to understand the intrinsic good and worthwhileness of the fulfillment of other agents and of those agents themselves.

We also grasp that others are in essentially the same practical position that we are in when we actively co-operate with others to pursue goods in common. I then understand that some other beings are related to me as co-subjects or as potential co-subjects. If I cooperate with others in pursuing the good of health or understanding, for example, I directly apprehend both myself and these others as subjects, as worthwhile in ourselves, and as persons for whom such goods as health, understanding, and so on, are worth pursuing. These co-subjects are distinct in kind from other beings, some of which also are alive, the natural (not free or deliberate) causality of which may assist or impede one's projects but are not (either actually or potentially) co-subjects.

The beings that a person should care for (herself and all others similarly

situated toward these intelligible goods) are agents, beings who persist through time – in philosophical language, substances. And an agent ought to care about what happens to her and to beings like her, not only when they are actually conscious but also during those periods of their lives when they are unable to respond to commands, to painful stimuli and the like. The beings that a person cares for – the beings whose welfare matters for her – are particular kinds of substantial entities, and these substantial entities exist before their basic, radical capacities for self-conscious acts and deliberate choice have developed to the stage where these capacities are immediately exercisable. And these substantial entities are valuable during those periods when, because of injury or illness, their capacities for rationality are not immediately exercisable. Hence the basis for distinguishing between those beings that a person should treat always as ends and never as mere means and those that she can use as mere means is the possession of a rational nature: every human being is a person.⁸

Thus, just as it is wrong to kill a human being today, it would also have been wrong to kill that human being ten years ago, or twenty years ago, or at any point in her existence. It would have been wrong to kill her when she was an infant but also when she was a fetus, and it would be wrong to kill her if she were elderly and in advanced dementia – because at each point she is the same human being.

An individual's having a rational nature means that she is inherently – that is, in virtue of what she is – oriented to conceptual thought and deliberate choice, and thus to shaping her own life, thereby constituting how good or bad a person she will be by her free choices. Having a nature that orients one to shaping his or her own life has no degrees; either a being has such a nature or not. And so the dividing line between beings that have basic rights and those that do not is not an arbitrarily selected degree of development along a continuum.

Let me now turn to an important objection to the position that I have

⁸ For further discussion of this position, see John Finnis, "Personal Identity in Aquinas and Shakespeare" in John Finnis, *Collected Essays*, Volume 2: *Intention and Identity* (New York NY: Oxford Univ. Press, 2011), ch. 2; Patrick Lee and Robert P. George, *Body-Self Dualism in Contemporary Ethics and Politics* (New York NY: Cambridge Univ. Press, 2008), ch. 1.

defended. Even though their own positions on the value of human life are far apart from each other, both Jeff McMahan and Don Marquis have raised the following objection to the position that I have just laid out. They deny that all human beings have a rational nature. Identifying humans by their genetic specification, they claim that there are two types of human individuals that lack a rational nature: some individuals who have suffered brain death and severely cognitively impaired human individuals (for example, anencephalic infants). According to McMahan and Marquis, these are human beings and yet they do not have a radical capacity for rational actions. And so they deny that having an actual nature justifies holding that all human beings have basic rights.⁹

One way of responding to this objection might be to say that, even though some human beings lack the capacity (or basic potentiality) for rational acts, they nevertheless belong to a kind – the human kind – the typical members of which do have such rational capacities. But I do not think that this is a good argument. In order for a particular entity to possess full basic rights, that very entity must possess the property that grounds being a subject of rights. What grounds being a subject of rights is, I have argued, the possession of a substantial, rational nature. But what makes an individual a human being and determines her nature is not centrally the genome in her cells but the possession of a nature that confers certain basic powers, namely, rational powers – although the actualization of those powers may require time and internal development. So, if a being does not possess a radical capacity for rational operation, then it would not be a human being.

Regarding individuals who seem to be kept alive after total brain death, there are two positions. Some hold that total brain death does not entail the human being's death and thus that bodies kept alive after total brain death are human beings, the same individuals who were alive before total brain death. According to them, some individuals have been kept alive after suffering total brain death, with the assistance of ventilator and other measures. Since these individuals seem to perform holistic actions – such as nutrition and respiration

⁹ Jeff McMahan, "Our Fellow Creatures," *Journal of Ethics* 9 (2005): 353-80; Don Marquis, "Why Abortion Is Seriously Wrong: Two Views" in *Bioethics with Liberty and Justice, Themes in the Work of Joseph Boyle*, ed. Christopher Tollefsen (New York NY: Springer, 2011), pp. 3-22.

(with assistance), temperature maintenance (with assistance), wound-healing, and so on – some philosophers hold that they are living and functioning human beings, although severely disabled.¹⁰

Others, myself included, have argued that total brain death is the death of the human being. So, if a body is kept alive after total brain death, that body is not the individual that was alive before that and is not a human being. One argument for that position is that since such bodies possess neither a brain nor the capacity to grow a brain, they lack the radical capacity to have a prerequisite for rational operations and so do not have a radical capacity for specifically human actions. A human being is a rational animal, an animal with a radical capacity for rational operations. Thus, since those bodies lack a radical capacity for rational operations – shown by the fact that they lack the radical capacity for conscious sensation, which is a prerequisite for rational operations in human beings – they are not rational animals and so not human beings. Total brain death is a substantial change, the death of the human being.¹¹

Those who hold that total brain death is not the death of the human being might hold one of two positions with respect to their capacity for rational operations. They might say that those who survive total brain death are human beings but that they lack the radical capacity for rational actions. If so, then – as McMahan and Marquis have pointed out – they cannot hold that every human being is a subject of basic rights in virtue of possessing a rational nature. They will either have to deny that every human being has basic rights or will have to point to a different basis than a rational nature for being a subject of rights.

Those who deny that total brain death is death, however, might instead say that the individuals who have suffered total brain death still do have the radical capacity for rational operations in virtue of their rational nature, despite

¹⁰ For example: D. Alan Shewmon, “Chronic ‘Brain Death’: Meta-Analysis and Conceptual Consequences,” *Neurology* 51 (1998), pp. 1538-45, and “The Brain and Somatic Integration: Insights Into the Standard Biological Rationale for Equating ‘Brain Death’ with Death,” *Journal of Medicine and Philosophy* (2001): 457-78; and more recently: Michael Accad, “Of Wholes and Parts: A Thomistic Refutation of ‘Brain Death’,” *Linacre Quarterly* 82 (2015): 217-34.

¹¹ Germain Grisez and I consider such a proposal but reject it in Patrick Lee and Germain Grisez, “Total Brain Death: A Reply to Alan Shewmon,” *Bioethics* 26 (2010): 275-84.

the fact that in the present circumstances they will not as a matter of fact (as opposed to a matter of necessity) realize that radical capacity. They might argue that in virtue of the human genetic composition possessed by those who have suffered total brain death they still have the internal potentiality (radical capacity) to develop a brain, with the help of transplanted stem cells.¹² Or perhaps they might insist in some other way that the human nature of the individual somehow grounds the radical capacity for rational operations. While this is not the position that I take, someone holding it could still reply to the objection of McMahan and Marquis and deny that the individuals who have suffered total brain death do not constitute a counter-example to the position that every human being has basic rights in virtue of possessing a rational nature.

Regarding the severely cognitively disabled human beings – for example, anencephalic infants – the answer is more straightforward. I think that the evidence indicates that they do have a radical capacity for rational operations but that it is impeded. One has a capacity to do something if one can do it, given an appropriate environment. And one can have a capacity but be impeded from exercising it: some factor, either internal or external, may prevent one from actualizing what one can do, given one's internal structure or nature. A living being has a radical capacity for a function if it has within itself a constitution that disposes it to perform that function in a suitable environment or to develop itself sufficiently to perform that function, given a suitable environment.

This is why we say that human embryos have the radical capacity for rational operations, even though they cannot right now perform such operations. They have the internal capacity to develop for themselves a brain, the substrate for conceptual thought and deliberate choice. They have the radical capacity for rational operations, given a suitable environment, nutrition, and lack of accident or disease.

Now, as long as a genetically human individual has some part of his or her brain, one cannot exclude the possibility that they could – in some cases perhaps after surgery or internal healing – recover the brain functioning

¹² Germain Grisez and I also consider this proposal but reject it in our “Total Brain Death: A Reply to Alan Shewmon,” *Bioethics* 26 (2010): 275-84.

sufficient to provide the sense experience needed as a prerequisite for conceptual thought and deliberate choice. Anencephalic infants, for example, from their conception on have the material resources and the genetic and epigenetic program for developing themselves to the mature stage of a human organism, but evidently the actualization of that program and internal potential becomes impeded by an internal factor. It may be that at some time in the future surgeons may discover how to correct the problem or to assist the infant in correcting that internal defect. The situation is similar with other severely cognitively impaired human individuals. The point is that these beings may now have the internal potential to develop themselves to the stage where they perform rational acts – the radical capacity for rational acts – in a suitable environment or with suitable assistance but are being impeded from doing so. Thus, it is reasonable to hold that severely cognitively impaired human individuals do have the radical capacity for rational operations. So, severely cognitively impaired human beings are not a counter-example to the position that all human beings have basic rights. They have these basic rights in virtue of their rational nature.

So, every human being has equal and inherent fundamental rights. There is a fundamental respect in which all rational beings, all persons, are equal: namely, each has a nature orienting her to shaping her life morally well or morally badly. Other factors in an individual that may facilitate her shaping her life well, or make it more difficult to shape her life well, do not make a difference with respect to whether she has fundamental dignity and fundamental rights.

Thus, having basic rights – moral immunity from being killed or enslaved, the right to be treated as others would have themselves be treated – follows upon being an individual with a rational nature. It does not follow on a property that varies in degrees (such as a certain degree of development of the basic capacity for self-conscious desires or a degree of development of rationality), nor on factors in one's constitution that will aid or impede the more complete development of one's rational nature.

Other rights are based on the varying degree of ability to reason (scholarships, for example), on moral goodness (rewards and punishments), or on acquired skills (for example, the right to play in the Master's golf tournament). But having basic rights to begin with is based on being a certain type of substance or subject.